No. 17-1077

In the Supreme Court of the United States

FRANCIS V. LORENZO,
Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

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STATEMENT PURSUANT TO RULE 29.6

There are no amendments to Petitioner's corporate disclosure statement as set forth in the Petition for a Writ of Certiorari.

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INTRODUCTION

In *Janus Capital Group, Inc. v. First Derivative Traders*, 564 U.S. 135 (2011) this Court held that one who does not make a misstatement cannot be held primarily liable for that misstatement under Section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. § 78j) and Rule 10b-5 (17 CFR 240.10b-5). While the SEC argues that the *Janus* holding should be limited to Rule 10b-5(b), the language of the *Janus* decision and the Court's reliance on its earlier decisions interpreting Section 10(b) do not support limiting *Janus* to only subsection (b). The SEC does not provide a supportable rationale for such a narrow reading of *Janus*. Moreover, allowing inadequate misstatement claims to simply be plead under Rules 10b-5(a), 10b-5(c) and 17(a)(1) of the Securities Act of 1933 (15 U.S.C. § 77q(a)(1)) would render *Janus* and Rule 10b-5(b) meaningless.

The SEC's brief also fails to address Petitioner's argument that Petitioner's conduct falls outside of the text of Sections 10(b) of the Exchange Act and 17(a)(1) of the Securities Act. Instead, the SEC's arguments in support of primary liability for Petitioner rest almost exclusively on the text of Rules 10b-5(a) and 10b-5(c). However, an administrative rule cannot go further than the statute on which it is based in proscribing conduct. The SEC's opposition brief also fails to cite a single precedent under any legal rule holding a defendant primarily liable for merely disseminating a statement made by another.

The SEC's argument that Petitioner took a different factual position in the D.C. Circuit than he did in this Court concerning his belief in the accuracy of the

statements in the emails is not only incorrect but it is barred by Supreme Court Rule 15.2, which requires the Respondent's brief in opposition to address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted. Moreover, Petitioner has not challenged the D.C. Circuit's holding on scienter and the SEC's arguments regarding Petitioner's purported different factual positions do not relate in any way to the question presented in this appeal.

The Petitioner's merits brief also demonstrated that the D.C. Circuit's decision effectively erased the distinction between primary and secondary liability under the securities laws. The SEC argues that the D.C. Circuit's decision preserves this distinction because Petitioner's own conduct makes him a primary violator of the securities laws. However, the only conduct Petitioner was found to have engaged in was producing and sending the emails in question. It was this ministerial conduct alone that the D.C. Circuit relied on when holding that Petitioner's dissemination of the statements in the emails -- of which he was not the maker -- constituted employing a deceptive 'device,' 'act,' or 'artifice to defraud.' The D.C. Circuit's low threshold for primary liability gives virtually no weight to Congress's well thought out distinction between primary and secondary liability and effectively revives private claims for aiding and abetting liability in contravention of *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994).

ARGUMENT

I. The SEC's Argument that a Defendant Who Did Not Make a Misstatement Could Still be Liable Under Rules 10b-5(a) and (c) and Section 17(a)(1) Undercuts the Holding in *Janus*

Petitioner's merits brief established that the D.C. Circuit erred when it held that Petitioner could be held primarily liable for violating Section 10(b), Rules 10b-5(a) and (c) and Section 17(a)(1) even though Petitioner was not the "maker" of the misstatements under the standards set forth in *Janus*.[1] Petitioner's brief also established that the D.C. Circuit erred when it held that Petitioner's ministerial role in sending the emails could constitute employing a deceptive 'device,' 'act,' or 'artifice to defraud' for purposes of primary liability under Section 10(b), Rule 10b-5(a) and (c), and Section17(a)(1). Once the D.C. Circuit found that Lorenzo was not the maker of the misstatements – and that Lorenzo did no more than produce[2] and send emails containing statements made by another – its inquiry should have ended.

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[1] *Amicus* North American Securities Administrators Association argues that the D.C. Circuit incorrectly held Petitioner did not "make" the statement under Rule 10b-5(b) within the meaning of *Janus* (NASAA Br. 18-25), however the SEC has not contested this holding and the argument is outside the question presented in this appeal.

[2] The D.C. Circuit did not cite any specific conduct that lead it to conclude Petitioner "produced" the emails.

In response to Petitioner's arguments that *Janus* forecloses liability on Rule 10b-5(a), 10b-5(c) and Section 17(a)(1) the SEC offers an extremely cramped reading of *Janus* and argues that the "*Janus* Court had no occasion to address, and did not address, the scope of Rule 10b-5(a), Rule 10b-5(c), or Section 17(a)" and that the "*Janus* Court's construction of the term "make" in Rule 10b-5(b), moreover, has no necessary implications for the scope of other antifraud provisions that do not use that word." (Resp. Br. 25)

It would be a mistake to adopt the SEC's argument and read *Janus* as a decision addressed solely to misstatements liability under Rule 10b-5(b), and not to misstatements liability generally under Section 10(b), Rule 10b-5 and Section 17(a)(1) as a whole. In fact, the *Janus* Court was careful to note that the "rule" it announced "follow[ed] from" its decisions interpreting Section 10(b) and Rule 10b-5 such as *Central Bank*, 511 U.S. at 143, and described that "rule" as applying "for purposes of Rule 10b-5" – not just subsection (b) of Rule 10b-5. *Janus*, 564 U.S. at 142, 148 & n.12.

The D.C. Circuit's decision also improperly blurred the statutory and regulatory distinction between fraudulent misstatements on one hand and fraudulent conduct on the other. Unlike Rule 10b-5(b), neither Rule 10b-5(a) nor 10b-5(c) uses the word "statement." Instead, subsection (a) refers to "any device, scheme or artifice" and subsection (c) refers to "any act, practice, or course of business." The text in subsections (a) and (c) do not address speaking, writing, or otherwise communicating, and are not synonymous with making a "statement." This is particularly true when the text of subsections (a) and (c) is compared with the text of

subsection (b) and its express focus on "statement[s]." Given this structure, subsections (a) and (c) are best read to be referring to conduct other than statements. Indeed, if subsections (a) and (c) embody all misstatement cases, then subsection (b) has no purpose or meaning at all -- a result at odds with the established principle that courts should not read "text in a way that makes part of it redundant." *See Corley v. United States*, 556 U.S. 303, 314 (2009); *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 669 (2007).

A. The SEC Proposes a Very Limited Reading of *Janus* that Makes the Decision Meaningless

Adopting the SEC's argument would permit every inadequate misstatement claim to be repackaged as a claim under Rules 10b-(a) and (c) and 17(a)(1) for employing a deceptive 'device,' 'act,' or 'artifice to defraud.' If the SEC's limited reading of *Janus* is accepted, the decision would become a nullity. In fact, the SEC's brief never suggests any situation to which *Janus* would apply if the SEC's reading of Rule 10b-5 prevails. The SEC's brief also does not suggest any convincing rationale as to why the holding in *Janus* should not be extended to Rule 10b-5(a), Rule 10b-5(c) and Section 17(a)(1).

Moreover, this is not a case of "some measure of overlap" between the subsections as the SEC argues (Resp. Br. 35) -- this is a wholesale erasure of one of the subsections and the elimination of the important distinction between fraudulent statements and fraudulent conduct. This Court has specifically cautioned "against reading a text in a way that makes

part of it redundant" *Nat'l Ass'n Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 669 (2007). In offering this reading of *Janus* the SEC ignores crucial elements of the decision including the *Janus* Court's reading of Section 10(b) and its reliance on *Stoneridge Investment Partners, LLC v. Scientific-Atlanta*, 552 U.S. 148 (2008), and *Central Bank*, neither of which turned on the text of Rule 10b-5, but rather rested on concerns about inappropriately expanding primary liability in a way that Congress never intended.

B. The SEC Misconstrues The Common Law Backdrop For Section 10(b)

The SEC's brief asserts that "the Commission, lower courts, and this Court have long upheld the imposition of liability under Section 17(a)(1) and Rule 10b-5(a) and (c) for fraudulent conduct that involves misstatements, even in the absence of liability for making misstatements under Rule 10b-5(b)" (Resp. Br. 13), yet the SEC does not cite a single case where a person has been held primarily liable for disseminating misstatements made by another. The SEC's reliance on common law in arguing that Petitioner should be held primarily liable is also misplaced.

The SEC mistakenly argues that the federal securities laws provide broader fraud protection than the common law and, *a fortiori*, if Petitioner's conduct would have exposed him to liability under the common law, the conduct would also be covered by the federal antifraud provisions. (Resp. Br. 27) But this has never been the law, and this Court explicitly rejected this argument in *Stoneridge* when it stated "Section 10(b) does not incorporate common-law fraud into federal

law." *Stoneridge*, 552 U.S. at 162 (collecting cases).[3] Indeed, in a case cited by the SEC, then-Judge Alito found that Section 10(b) cases do not "provide reliable guidance" as to what the common law would hold. *MBIA Ins. Corp. v. Royal Indem. Co.*, 426 F.3d 204, 218 (3d Cir. 2005) (Alito, J.). Thus, while the SEC is correct that the securities laws go beyond the common law in some instances, and while the private Section 10(b) cause of action draws on some common law doctrines, the SEC's reliance on common law does not answer the question before the Court.

In fact, the common law authorities cited by the SEC only underline the fact that the common law would not treat the SEC's theory as one of primary fraud. All of the precedents cited by the SEC involved common law conspiracy claims. *See Zuckerman v. Cochran*, 158 So. 324, 325 (Ala. 1934) ("statements were made in accord with the fraudulent and wrongful conspiracy or agreement"); *Bank of Commerce & Trust Co. v. Schooner*, 160 N.E. 790, 791 (Mass. 1928) ("the

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[3] The SEC reached the opposite conclusion in *In re Dennis J. Malouf*, Securities Act Release No. 10115, at 10, 2016 WL 4035575 at *6 n. 22 (July 27, 2016) (*Malouf*, Release No. 10115), corrected by Securities Act Release No. 10207, 2016 WL 4761084 (Sept. 13, 2016) but it did so entirely on the basis of Circuit decisions from the 1970s without citing or discussing *Stoneridge*. *Malouf* elsewhere relies on district court cases predating *Stoneridge* for propositions explicitly rejected by this Court in *Stoneridge*. *See Malouf*, 2016 WL 4035575, at *8 nn. 44 & 50. This is precisely the sort of antagonistic treatment of this Court's precedents that then-Judge Kavanaugh criticized in his dissent below. *See* App. 47 n.4 (citing Andrew N. Vollmer, *SEC Revanchism and the Expansion of Primary Liability Under Section 17(a) and Rule 10b-5*, 10 VA. L. & Bus. Rev. 273 (2016)).

declaration alleges a conspiracy between the defendant and Cox to defraud certain banks and trust companies"); *Cheney v. Powell*, 15 S.E. 750, 751 (Ga. 1892) ("the action is in tort, and the declaration alleges conspiracy"). *See also* 1 M. Bigelow, *A Treatise on the Law of Fraud on its Civil Side* § 8 at 246-48 (1888) (section on "Conspirators and the Like"). This Court's decision in *Central Bank*, however, forecloses conspiracy liability in Section 10(b) civil cases for the same reasons it forecloses aiding and abetting. *See, e.g., Dinsmore v. Squadron, Ellenoff, Plesent, Sheinfeld & Sorkin*, 135 F.3d 837, 843-44 (2d Cir. 1998). And unlike aiding and abetting, the SEC (in contrast to the Department of Justice) is given no separate statutory authority to pursue conspiracy claims.

Moreover, even in the conspiracy context, the SEC cites no common law authority for primary liability merely for disseminating the statements of others. *See Zuckerman*, 158 So. at 325-36 (defendant sold land to plaintiff on the basis of promises made by both him and another that the other would buy the land at a profit); *Bank of Commerce*, 160 N.E. at 792 (defendant obtained loans on the basis of bonds he did not own, to build a false "reputation of financial responsibility" aided by another's representations); *Cheney*, 15 S.E. at 750 (representations were made by another based on behind-the-scenes conduct by defendant). Instead, as the Court noted in *Chiarella v. United States*, 445 U.S. 222, 228 n.10 (1980) and the Commission itself noted in *Cady, Roberts & Co.*, 40 S.E.C. 907, 916 n.13, 31 (1961)(*citing Strong v. Repide*, 213 U.S. 419, 430 (1909), and *Pepper v. Litton*, 308 U.S. 295, 307 n.15 (1939)) this Court's common law decisions focused on the presence of a fiduciary duty of disclosure to supply

liability in those instances where the defendant did not himself make a statement. *Stewart v. Wyoming Cattle-Ranche Co.*, 128 U.S. 383, 388 (1888). *See* Sec. Indus. & Fin. Markets Ass'n (SIFMA) & Chamber of Commerce Amici Br. 10-11 & n. 4.

II. The SEC Failed to Show that Petitioner's Own Conduct Falls Within the Text of Sections 10(b) and 17(a)

A. The SEC Fails To Respond To Petitioner's and Amici's Statutory Analysis of Sections 10(b) and 17(a)

The Petitioner's brief also demonstrated that the Petitioner did not violate Section 10(b) because his conduct does not meet the definition of "deception" or "manipulation" that is used in the text of Section 10(b). We also demonstrated that Petitioner did not violate Rule 10b-5 because Rule 10b-5 cannot impose liability beyond the scope of Section 10(b) itself. Petitioner's brief established that Petitioner did not violate either Section 10(b) or Section 17(a)(1) because he did not "use" or "employ" a manipulative, deceptive or fraudulent device or scheme.

Section 10(b) "prohibits only the making of a material misstatement (or omission) or the commission of a manipulative act. . . . We cannot amend the statute to create liability for acts that are not themselves manipulative or deceptive within the meaning of the statute." *Central Bank*, 511 U.S. at 177-78 (1994). *Central Bank* also stated that the "it is inconsistent with settled methodology in § 10(b) cases to extend liability beyond the scope of conduct prohibited by the statutory text." *Id.* at 175, 177. The *Central Bank* Court

further stated it has "refused to allow 10b-5 challenges to conduct not prohibited by the text of the statute." *Id.* at 173.

This Court has concluded that "[t]he language of §10(b) gives no indication that Congress meant to prohibit any conduct not involving manipulation or deception." *Santa Fe Industries v. Green*, 430 U.S. 462, 473 (1977). In *Chiarella* the Court addressed the concept of deception and the Court refused to extend the concept of "deception" beyond the basic common law categories of misrepresentation or a duty to disclose, holding that "[w]hen an allegation of fraud is based upon nondisclosure, there can be no fraud absent a duty to speak . . . premised upon a duty to disclose arising from a relationship of trust and confidence between the parties to a transaction." 445 U.S. 235, 230. The *Chiarella* Court expressly held that the need for either a misrepresentation or a duty to disclose is an essential element of liability under Rules 10b-5(a) or (c). The holdings in *Santa Fe* and *Chiarella* made clear that under Rules 10b-5(a) and (c), just as under Rule 10b-5(b), liability cannot extend beyond three categories: (1) the making of a misrepresentation, (2) an omission or nondisclosure coupled with a duty to speak, and (3) the commission of a manipulative act.

Here, the SEC relies on the absence of any reference to the word "make" in subsections (a) and (c) of Rule 10b-5 and Section 17(a)(1) in arguing against extending *Janus* to those subsections. However, the essential elements of a Section 10(b) claim, namely a misrepresentation, duty to disclose or execution of a manipulative trade, are still required by Section 10(b) itself when pursuing a claim under Rule 10b-5(a) or (c).

Moreover, the SEC's brief focuses almost entirely on the language of Rule 10b-5 and Section 17(a)(1), to the exclusion of Section 10(b). The SEC makes little effort to respond to the arguments of Petitioner or Amici SIFMA & Chamber of Commerce that the scope of Rule 10b-5 is limited by the language of the statute and by the Court's caselaw construing it since *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 212-14 (1976), in which the Court first held that Rule 10b-5 is limited by the text of Section 10(b). Instead, the SEC dismisses four decades of the Court's own precedents as a "gloss" on Section 10(b) entitled to no weight. (Resp. Br. 22) (citing SIFMA & Chamber of Commerce Amic. Br. 9-11) The SEC has thus all but conceded that its argument for Petitioner's primary liability cannot be supported on the basis of either the statutory language of Section 10(b) or the Court's reading of that language in recent decades, and requires the support of the language of Rule 10b-5 to do what Section 10(b) does not. This is exactly the position the Court has rejected since *Ernst*.

The SEC's opposition brief (and that of Amici NASAA) fails to cite a single precedent – whether a case or an administrative proceeding – under any legal rule holding a defendant primarily liable for merely disseminating a statement made by another. While the SEC claims that "the conduct in which petitioner was found to have engaged has long been treated as actionably fraudulent, both under the federal securities laws and under their common-law antecedents" (Resp. Br. 39), it never identifies a single supporting example anywhere in American law.

In other parts of the securities laws when Congress wanted to impose liability for the dissemination of false

statements it did so explicitly. *See* Section 9(a)(5) of the Exchange Act (15 U.S. Code § 78i(a)(5) and Section 17(b) of the Securities Act (15 U.S. Code § 77q(b), which address "circulation," "dissemination," and "publish[ing]" of certain types of statements – language Congress could have, but did not, use in Section 10(b) and 17(a). *See also* SIFMA & Chamber of Commerce Amic. Br. 19-22. Similarly, Section 18(a) of the Exchange Act imposes liability on any defendant who "shall make or cause to be made" a statement that is "false or misleading with respect to any material fact" in "any application, report or document filed" pursuant to the Exchange Act. In Sections 10(b) and 17(a), by contrast, Congress did not prohibit the "causing" of a deceptive device, but instead stopped at the defendant who actually "use[s] or employ[s]" the deceptive device in connection with the purchase or sale of securities (in the case of 10(b)) and the offer or sale of securities (in the case of 17(a)).

The SEC's brief also misstates the legislative history of Section 10(b) when it cites to the Senate Report accompanying the Exchange Act. The SEC conflates the Senate's discussion of Section 9(a)(5) with that of Section 10(b). The SEC claims that "[t]he Senate Report accompanying the Exchange Act identified 'the dissemination of false information' as an example of a 'device[ ]' that is 'subjected to regulation by the Commission,' and it equated the 'devices' prohibited by Section 10(b) with "manipulative or deceptive practices." Resp. Br. 17 (citing S. Rep. No. 792, 73d Cong., 2d Sess. 8-9, 18 (1934)). But this is inaccurate in two ways. The reference on page 8 of the Senate Report plainly describes the conduct specifically banned by Section 9(a)(5), namely the undisclosed

payment of 'touts' to engage in "dissemination of false information and tipster sheets." Senate Report, at 8, 17. As the SIFMA & Chamber of Commerce amici noted, this is the precise point on which the language of Section 9(a)(5) is deliberately and explicitly broader than that of Section 10(b). SIFMA & Chamber of Commerce Amic. Br. 20. Also, the Senate Report describes as "subjected to regulation by the Commission" a different set of price-stabilizing practices (such as "pegging") that are "not abolished by statute" but subject to rulemaking under Section 9(a)(6). Senate Report, at 8-9, 17. None of this discussion in the Senate report refers to Section 10(b), whose legislative history this Court and others have previously found opaque and unenlightening. *See, e.g., Chiarella*, 445 U.S. at 226; *Ernst*, 425 U.S. at 201-03.

Instead of addressing Petitioner's and amici's statutory Section 10(b) arguments, the SEC relies extensively on pre-1976 authorities, on lower-court Section 17 precedents, on the SEC's own interpretations (to which the Court need not defer) and on cases construing statutory language (such as the mail fraud statute) not found in Section 10(b). The SEC's brief also places heavy reliance on the statutory term "scheme" – found in Section 17(a)(1), but not in Section 10(b) – despite the absence of any finding in this matter by the D.C. Circuit, the Commission, or the Administrative Law Judge of a "scheme," which is a fact the SEC ignores.

B. The SEC Cites Inapposite Case Law and Statutes To Support Its Argument Regarding Petitioner's Section 10(b) Liability

The SEC relies on a variety of cases that have nothing to do with the question of whether a person who disseminated a misstatement made by another can be held primarily liable for that misstatement. For example, the SEC cites Section 10(b) cases that explicitly avoided deciding the question of liability for defendants who neither made a statement nor owed a duty to disclose. In *Superintendent of Ins. of N.Y. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 8 n.1, 9-10 (1971), which the SEC presents as a case about "false asset reports," Resp. Br. 16 & 18, this Court held that Section 10(b) was violated when a seller of bonds was deceived about the value it received in the sale; the Court expressly declined to address the liability of individual defendants or other aspects of the transaction. *Id.* at 13 & n. 10. Likewise, *SEC v. National Securities, Inc.*, 393 U.S. 453, 467 (1969), stands for the unremarkable proposition that Section 10(b) governs misrepresentations in proxy statements sent to shareholders to induce approval of a merger; no issues of liability for particular defendants was considered. *Id.* at 465 ("[I]n deciding this particular case, remembering what is not involved is as important as determining what is.").

The SEC reaches even further to rely on dicta in *Chadbourne & Parke LLP v. Troice*, 134 S. Ct. 1058, 1063 (2014). Resp. 30. But *Chadbourne* was construing a different statute, the Securities Litigation Uniform Standards Act, which contains two alternative

provisions: "(A) a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security; or (B) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security." *Id.* at 1064 (quoting 15 U.S.C. § 78bb(f)(1)(A)-(B)). *Chadbourne* in no way purported to construe Section 10(b).

Finally, the SEC invokes the mail fraud statute (Resp. 17), but this statute says nothing about Section 10(b), and is not helpful to the construction of Section 17(a)(1), either. The mail fraud statute speaks of a "scheme or artifice to defraud," but as noted above, Section 10(b) makes no reference to "schemes," and even regarding the Section 17(a)(1) claim, neither the D.C. Circuit nor the Commission or the Administrative Law Judge found a scheme on the record in this case. What the SEC does not do, in regard to Section 17(a)(1), is explain what the elements of a violation of that statute are or how they differ from the simple making of a misrepresentation, despite Circuit authority -- which the SEC ignores -- suggesting that a fraudulent scheme under Section 17(a)(1) may require "conduct beyond just misrepresentations or omissions." *SEC v. Quan*, 817 F.3d 583, 589 (8th Cir. 2016) (quoting jury instructions). The SEC also fails to demonstrate how Petitioner's conduct falls under Section 17(a)(1)'s prohibitions. In any event, none of the mail fraud cases cited by the SEC prove its point. *Durland v. United States*, 161 U.S. 306, 510-11 (1896), for example, involved letters written directly by the defendant to investors. The SEC also cites to *United States v. Maze*, 414 U.S. 395, 406 (1974), without

disclosing that it is citing Chief Justice Burger's dissent and that the conviction in *Maze* was reversed.

III. The SEC's Argument that the Petitioner Has Taken a Different Factual Position in the Court Below is Without Merit

The SEC for the first time now argues that Petitioner is taking an inconsistent factual position in this Court than what he took below regarding his belief in the accuracy of the statements in the emails he sent. The SEC argues that there is a conflict between Petitioner's argument in the D.C. Circuit that at the time the emails were sent Petitioner believed the statements to be true and the argument in this Court (and the court below) that he didn't draft or carefully read the emails.[4] The SEC argues that "[p]etitioner could not have believed the statements to be true, as he argued to the court of appeals, if he did not read them." (Resp. Br. 19)

However, there is no conflict because in the D.C. Circuit Petitioner argued that his belief in the accuracy of the emails was based on the fact that the emails were prepared by his boss, the owner of Charles Vista, and Petitioner had no reason to doubt the veracity of

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[4] In mischaracterizing Petitioner's arguments the SEC takes statements in Petitioner's brief out of context and wholly ignores the Petitioner's Facts section of the brief, which states Petitioner's "emails were copy and pasted from his boss" and that "Lorenzo testified that he sent the emails without thinking about the contents." (Pet. Opening Br. 10)(citations omitted). Ultimately whether Petitioner read the emails or not before sending them is of no moment because Petitioner has not challenged the D.C. Circuit's finding with regards to scienter.

the statements that were prepared by his boss. Petitioner has never argued, either in this Court or in the D.C. Circuit, that his belief in the accuracy of the statements in the emails was based on his having read the emails and performed an independent analysis of the content of the emails to determine their truth or falsity. In fact, in his brief in the D.C. Circuit Petitioner specifically argued that "Petitioner had a good faith belief in the accuracy of the statements contained in the email because the statements came from...the owner of Charles Vista" (Pet. D.C. Circuit Opening Br. 22). Petitioner recognizes that the D.C. Circuit rejected this argument but there is no inconsistency between the position the Petitioner took in the D.C. Circuit and the position he takes in this Court. Contrary to the SEC's statement that Petitioner is attempting to relitigate scienter (Resp. Br. 19), Petitioner has not challenged the D.C. Circuit's finding of scienter in this appeal and scienter is not part of the question presented to this Court.

The SEC's argument that Petitioner took a different position in the D.C. Circuit than he takes in this Court is also based on the SEC conflating two separate arguments Petitioner made in the D.C. Circuit. These two arguments are the argument in the D.C. Circuit that the statements were not objectively false and the argument that Petitioner did not act with scienter. Petitioner argued in the D.C. Circuit that the statements in the emails were objectively true and, as a result, the SEC did not prove one of the elements its Rule 10b-5 claim. (Pet. D.C. Circuit Opening Br. 12-18) Petitioner based this argument on documentary evidence found in SEC filings and exhibits introduced at the administrative hearing and not on any

independent investigation that Petitioner undertook. *Id.* None of these arguments have anything to do with Petitioner's scienter and, more importantly, none of these arguments have been advanced by the Petitioner in this Court and they are simply not part of the issues the Court has to address.

Finally, the SEC's meritless arguments that Petitioner is taking a different view of the facts in this Court are waived because the SEC did not raise them in its brief in opposition to the cert petition. Supreme Court Rule 15.2. Rule 15.2 provides in pertinent part:

> In addition to presenting other arguments for denying the petition, the brief in opposition should address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted. Counsel are admonished that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition. Any objection to consideration of a question presented based on what occurred in the proceedings below, if the objection does not go to jurisdiction, may be deemed waived unless called to the Court's attention in the brief in opposition.

This Court's precedent demonstrates that the Court refuses to address issues a respondent raised for the first time in merits briefing and not in a respondent's brief in opposition to the Petition for Writ of Certiorari. The Court also has also, on occasion, treated as being established statements of fact from the petition that the respondent didn't contest in its brief in opposition.

See, e.g. Corcieri v. Salazar, 555 U.S. 379, 395-396 (2009).

> Respondents' brief in opposition declined to contest [the assertion that the Narragansett Indian Tribe ... was neither federally recognized nor under the jurisdiction of the federal government]. Under our rules, that alone is reason to accept this as fact for purposes of our decision in this case. *See* this Court's Rule 15.2. We therefore reverse the judgment of the Court of Appeals. (citations omitted)

The SEC's Brief in Opposition to the Petition for Writ of Certiorari never suggested Petitioner's factual position in the petition was inconsistent with his position before the D.C. Circuit and it is simply too late for the SEC to raise arguments based on record materials it never cited in its brief in opposition.

IV. Affirming the D.C. Circuit Would Erase the Distinction Between Primary and Secondary Liability

The SEC argues that the D.C. Circuit's decision preserves the distinction between primary and secondary liability because Petitioner's own conduct makes him a primary violator of the securities laws. But the only conduct Petitioner was found to have engaged in was his producing and sending the emails in question. (Resp. Br. 33) It was this ministerial conduct alone that the D.C. Circuit relied on when holding that Petitioner's dissemination of the emails constituted employing a deceptive 'device,' 'act,' or 'artifice to defraud' even though he was not the maker of the statements in the emails.

The D.C. Circuit's low threshold for primary liability gives virtually no weight to Congress's well thought out distinction between primary and secondary liability as reflected in the language of the main aiding and abetting statutes, Section 15(b) of the Securities Act, 15 U.S.C. § 77o(b), and Section 20(e) of the Exchange Act, 15 U.S.C. § 78t(e). As amici Law Professors argued:

> Congress said a key element of aiding and abetting is that the defendant must provide substantial assistance. Under the current version of Section 20(e), the SEC may bring an action against "any person that knowingly or recklessly provides substantial assistance to another person" that violated the Exchange Act or its regulations. If substantial assistance is required for aiding and abetting, primary liability must require more. If substantial assistance were enough for primary liability, no difference between a primary actor and an aider and abettor would exist. *Central Bank* and Congress's adoption of aiding and abetting provisions would have served no purpose. The statutory substantial assistance requirement tells us that a difference between primary liability and aiding and abetting must exist, and it must be meaningful and substantial. (Law Professors Amici Br. 8)

Not only does a low threshold for primary liability undermine Congress's determination that "substantial assistance" is required for aiding and abetting liability it also conflicts with this Court's decisions in *Central Bank of Denver, NA v. First Interstate Bank of Denver,*

NA, 511 U.S. 164 (1994), *Janus*, and *Stoneridge*. Those decisions show that primary liability under Rule 10b-5 must be closely linked to a misstatement or misconduct that deceived a securities offeree, buyer, or seller.

V. Affirming the D.C. Circuit Would Result in Numerous Meritless Lawsuits

The difference between primary and secondary liability is of critical importance in private securities litigation because under *Central Bank* plaintiffs in private securities litigation, including class actions, may not assert claims for aiding and abetting liability. Petitioner's brief demonstrated that affirming the D.C. Circuit's decision would undermine *Central Bank* by raising significant uncertainty about the scope of primary liability. *Central Bank* held that liability under Section 10(b) is " 'an area that demands certainty and predictability.' " 511 U.S. at 188 (*quoting Pinter v. Dahl*, 486 U.S. 622, 652 (1988)). This is because uncertainty drives up the costs of numerous legitimate transactions and eliminates some altogether. *See* 511 U.S. at 188-89. Affirming the D.C. Circuit's decision would in substance revive the implied cause of action against aiders and abettors, a result soundly rejected by the *Stoneridge* Court.

The SEC's response is that the Private Securities Litigation Reform Act of 1995 (the "PSLRA") (Pub. L. No. 104-67, 109 Stat. 737), with its heightened pleading standards and other requirements for private lawsuits and the Securities Litigation Uniform Standards Act of 1998, 112 Stat. 3227, which curtailed plaintiffs' ability to evade the PSLRA's limitations on federal securities-fraud litigation by bringing class-action suits under state rather than federal law, would protect defendants

from meritless private lawsuits. (Resp. Br. 38-39) However, the SEC's argument misses the mark. "[P]laintiffs with weak claims [can] extort settlements" from "innocent" companies that nevertheless fear "extensive discovery and the potential for uncertainty and disruption in a lawsuit." *Stoneridge*, 552 U.S. at 163; *see also Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 80–81 (2006). (SIFMA & Chamber of Commerce Amici Br. 24) The SIFMA & Chamber of Commerce Amici Brief further discusses how private lawsuits can be employed "abusively to impose substantial costs on companies and individuals whose conduct conforms to the law." (SIFMA & Chamber of Commerce Amici Br. 24) The SEC's reliance on the PSLRA to protect defendants from meritless lawsuits is particularly misguided because "[s]ince Congress enacted the PSLRA in 1995, securities class actions have wiped out over $701 billion in investment value and given shareholders only $90 billion. (SIFMA & Chamber of Commerce Amici Br. 25).

The SEC's PSLRA argument, moreover, would put an unsupportable interpretation on Congress' specific response to *Central Bank* in PSLRA §104. *Stoneridge*, 552 U.S. at 162. In response to *Central Bank*'s elimination of aiding and abetting liability in 1995 Congress passed Section 20(e) of the Exchange Act as part of the PSLRA. Section 20(e) restored the SEC's ability to bring actions for aiding and abetting against anyone who "knowingly or recklessly provides substantial assistance to another person" in a violation of the federal securities laws. Section 20(e) did not restore the ability of private plaintiffs to bring aiding and abetting claims. The D.C. Circuit's revival of the

implied cause of action against aiders and abettors undermines Congress's determination that this class of defendants should be pursued only by the SEC. *Id.*

CONCLUSION

For the foregoing reasons the judgment of the D.C. Circuit holding that Petitioner violated Section 10(b) of the Exchange Act, Rules 10b-5(a) and (c) and Section 17(a)(1) of the Securities Act should be reversed.

Respectfully submitted,

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